

MORALITY, PROPERTY AND SLAVERY

by

ALAN DONAGAN



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Phyllis Fay Horton
Professor of Humanities
University of Chicago

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τρέφονται γὰρ πάντες οἱ ἄνθρωποι νόμοι ὑπὸ ἐνὸς τοῦ θεοῦ.

—Herakleitos (Diels, *Fragmente der Vorsokratiker*, 5th edn., fr. 114.)

The oldfashioned doctrine that morality is a set of requirements on conduct imposed by practical reason, requirements which can be set out in a deductive system, is here and there regaining favour.¹ Yet some who incline to it dismiss it because they do not see how it can make sense either of the variety of morally valid forms of the institution of property, or of the nature of some of the considerations that arise when the moral validity of particular forms of that institution is in question.

Their difficulty is this. In every human society the moral system of which expresses requirements of practical reason some form of property must be instituted, because no human society could be utterly without any form of it. Hence any actual moral system to which a true deductive theory would apply would have to contain precepts, such as the familiar prohibition of stealing, relating to that institution. But since there may well be as many forms of the institution of property as there are societies the moral systems of which express requirements of practical reason, what such a precept as *Thou shall not steal* refers to in one of those societies may differ widely from what it refers to in another. These differences are readily explained by taking such precepts to be elliptical, so that *Thou shall not steal*, when set out in full, would become something like: *Within the territorial boundaries of an established political society thou shalt not appropriate what, according to the form of property instituted in that society, is the property of another indi-*

The printed version of this lecture is a third longer than the one that was delivered. For pointing out mistakes and infelicities in the original version, thereby giving me an opportunity to correct them, I am deeply grateful to those members of the audience who made comments immediately after it, and to my hospitable hosts, the members of the Department of Philosophy at Kansas, who made others later still.

vidual or group. However, if this is the sense of the moral precept forbidding stealing, it seems to follow that no such precept could

possibly follow from the fundamental principles of a deductive system expressing requirements of practical reason. The historical origins of the forms of property actually in force, when not obscure, are as various as they are colourful. But there is no existing political society in which the property rights legally recognized can be seriously held to derive, by legitimate transfer or inheritance, from original appropriations that accord with the fundamental principles of any defensible deductive moral theory. Must we not conclude, then, either that there is no society in which the property rights actually recognized are morally valid, or that morality is not what deductive theories of it take it to be?

Well no, we need not. But the way out unfortunately appears to lead to even worse moral difficulties. Still, let us see what the way out is.

There are institutions which make it possible for individuals to create moral duties which morality itself does not. The institution of giving and accepting promises is the most obvious example. Even where that institution exists, nobody is compelled either to give or to accept a promise; and if none were given or accepted, there would be no promises which anybody had the duty to keep. But although morality by itself creates no duties of promise-keeping, it does provide that, certain conditions being met (for example, that the promise not be to do anything immoral), if a promise is made and accepted, then it must be kept.

Political society is another institution by which human beings, in this instance by organized collective action, can create moral duties which morality itself does not. A political society is an organized group of human beings established in a region of the earth, within the boundaries of which it enforces its authority to determine not only what system of legal justice shall obtain, but also on what terms any other institution or society may exist. To be genuinely political, such a society must express, over a reasonable period, the continuing will of a sizable body of its opinion-making members, whether they are politically enfranchised or not. Hence no political society can endure unless, consistently with maintaining its authority, it responds to deep and sustained public demands for institutional change: if it does not respond, either it will dissolve, or it will degenerate into a nonpolitical tyranny.

Morality permits political societies to exist, just as it permits the institution of making and accepting promises. Hence it permits a political society to legislate concerning the system of justice that

shall obtain in it, and concerning the terms on which other institutions or societies shall exist in it. Although most of the laws thus passed will not themselves be deductible from the principles of morality, morality confers a moral sanction on them by permitting the existence of the political society that has passed them. Besides incurring whatever legal penalties may be imposed, to break the laws of a morally permissible existing political society is *morally* wrong. Now the system of justice of any existing political society will both define the forms of property instituted in that society, and provide for their protection. May not the moral basis of respect for the forms of property established in any actual political society then be simply the moral duty of lawabidingness?

Up to a point, it not only may be, but is. Consider the transfer to his heirs of the property of somebody presumed dead. Legislation as to the conditions under which death is to be presumed is obviously necessary, different political societies legislate differently, and morally there need not be a pin to choose between the different laws they enact. It therefore seems hardly deniable that whether or not a given heir has a moral title to property bequeathed to him by a missing person will depend wholly on the political society in which that property is held: in one society the missing person may be presumed dead under the circumstances that obtain, and in another not. Unfortunately, however, there is an objection in principle to settling all cases of moral title to property in this simple if indirect way. In considering the nonpolitical institution of promising it was remarked that, while the making and accepting of promises creates duties that morality by itself does not, it cannot create duties that violate the principles of morality: no promise to do something immoral is morally binding. No more can a political society, by legislation, create duties to violate the principles of morality. Because political society is a morally permissible form of human association, members of such societies have a moral duty to abide by their laws. But that duty is conditional upon whether the laws of those societies are themselves consistent with morality.

Taking it as established that the forms of property instituted in a given political society give rise to moral duties only if they are consistent with the principles of morality, what conditions, if any, do the principles of morality impose on forms of property?

So far, it has been possible to examine the implications of morality for the institution of property neutrally, without deciding between different positions as to what the principles of morality are.

On no consistent theory of morality can legal duties that violate moral principles be sanctioned by those principles. But since what conditions, if any, morality may impose on property must depend on what its principles are, it can occasion no surprise that those who disagree about what the principles of morality are often disagree about what forms of property are morally permissible. In exploring the conditions imposed by morality on property, then, neutrality is out of the question. We can proceed only if, at least for the sake of discussion, we can agree about what the principles of morality are.

According to the oldfashioned conception of morality that gave rise to the topic of this lecture, for an action to be morally right or wrong is the same thing as for it to be unconditionally required or forbidden by practical reason. Such a conception of morality presupposes that reason is practical as well as theoretical: that is, that there are rational answers to questions of the form, 'Shall an action of such and such a kind be done in circumstances of such and such a kind, or not?' as well as to those of the form 'Is it true that so-and-so, or false?' Nor is that all. Many who, like Professor Philippa Foot, agree that reason is practical, would nevertheless confine its practical application to laying down hypothetical imperatives of the sort Kant called 'imperatives of skill': that is, to prescribing what kinds of action are to be done, or not done, on the hypothesis that an end of a certain kind is to be realized.² While the principle underlying imperatives of skill is not in itself hypothetical—in effect it forbids protracted indecision, and commands us to make up our minds whether to fish or cut bait³—the specific imperatives of skill to which it gives rise are all conditional, and so not moral. They command no kind of action unconditionally—except that either you abandon your proposed end, or do what is necessary for attaining it. A kind of action can be morally right only if it would be contrary to practical reason to omit to do it, irrespective of whatever ends you seek; and it can be morally wrong only if it would be contrary to practical reason to do it. As Kant put it, the imperatives of morality cannot be conditional upon whatever ends we may wish to realize: they are *categorical*.⁴

Morality can be analysed in terms of practical reason only if reason does unconditionally require that, in certain kinds of situation, certain kinds of action be done, or not be done. Does it? And if it does, by what process does it require it?

In answer, Kant described two processes by which practical

reason generates moral requirements; and he mistakenly asserted that they are equivalent.⁵ Both remain widely misunderstood, although recent commentators like Professor Aune get them right.⁶ The first was the use of his celebrated universalization test. However, to that it has been reasonably objected that, in most departments of morality, it fails to yield sufficiently specific results—even though Hegel's complaint was unjust that it yields no more than the form of moral precepts, without any content at all. The second was derivation from the principle that every rational being is to be treated as an end, and never *merely* as a means. Following Henry Sidgwick and W. D. Ross, the fashion endures among English-speaking philosophers of dismissing this principle as highminded but unintelligible.⁷ No worse mistake could be made. For as Kant explained, only to be stubbornly misread by Sidgwick and Ross, two kinds of end must be distinguished: producible ends, which agents try to bring about; and self-subsistent ends, or existing beings for whose sake producible ends are produced. Producible ends are necessarily conditional upon the existence of self-subsistent ends, and on what the needs of those ends may be. Self-subsistent ends, by contrast, are ends-in-themselves.

Reason can be practical in the way morality presupposes only if there are self-subsistent ends, or ends-in-themselves. And Kant held that there are such ends. 'Man, and in general every rational being, *exists* as an end in himself and *not merely as a means* to be arbitrarily used by this or that will.'⁸

In what follows, I shall assume that Kant was right, and that in this recognition of rational nature as an end in itself we have the foundation of traditional western morality. While I shall not try to establish either assumption, having done so elsewhere,⁹ a little by way of elucidation must be added. In offering Kant's principle as the foundation of morality, I mean that there is nothing more fundamental from which it can be derived. However, I do not offer it as an intuitive truth: I do not think its truth is evident to every rational being who understands it and thinks about it. Some philosophers hold that it, or something very like it, can be established dialectically; as Aristotle attempted to establish the principle of contradiction. For example, my colleague, Professor Alan Gewirth, has attempted so to establish it in his monumental book *Reason and Morality*,¹⁰ an anticipation of which he presented to you in the Lindley Lecture for 1972, 'Moral Rationality.' I have not made up my mind on whether any such attempt can succeed (or, *a fortiori*,

that any particular one has succeeded). But I maintain that we can rationally judge that it is contrary to practical reason to treat any being of rational nature merely as a means to the wellbeing of any other being whatever, even if it cannot be established dialectically. It is a matter of recognizing the unique status of beings who have the power to choose the ends of their actions as they see fit.

In offering his theory of the foundation of morality, Kant professed no more than to have formulated, with philosophical exactitude, a truth recognized in the popular moral culture of his society. His unphilosophical neighbours would probably have expressed it in biblical terms, quoting such things as St James's reference in his *Epistle* to 'the royal law according to the Scripture [that is, the Jewish Scripture], "Thou shalt love thy neighbour as thyself"' (2:8). Because the word 'love' is now primarily associated with emotion, and often confined to erotic emotion, I have elsewhere suggested that in our day St James's royal law might be less misleadingly expressed as 'Thou shalt respect thy neighbor and thyself as rational beings.'¹¹ Curiously this would itself have been misleading when the King James version of the *New Testament* was made; for in the very next verse the translators used the phrase 'respector of persons' to stand for something opposed to what they meant by 'love of one's neighbour'—namely, for violating what is owed to each of one's neighbours out of special regard for some of them.

It is often objected that in no form is the Kantian foundation sufficiently definite for its implications to be rigorously worked out. Such an objection would have weight if traditional morality were formalizable as an axiomatic system. In such a system, the reference of such an expression as 'treat as an end' (or 'love' or 'respect') would be implicitly fixed by a set of axioms containing it: an acceptable reference would be held to be provided by any assignment of sense to it such that, taken in that sense, those axioms would be true. Kant, of course, neither provided such a set of axioms, nor believed that one can be provided. As the structure of his *Grundlegung* unmistakably shows, he took it for granted that the sense of 'treat as an end,' and the senses of other expressions related to it, were revealed in practical judgements embodying the corresponding German expressions that were made in the common life of his society. The same would hold for the sense of any equivalent expression, such as the biblical 'love' or my 'respect.' Those who introduce such expressions in formulating the foundation of morality presume themselves to be addressing an audience in whose

culture those expressions or others close to them in sense are in familiar use, and who either agree on their application in most cases, or at least find their disagreements mutually intelligible. If, for example, you cannot perceive that it made sense for Kant to hold that killing somebody for a whim fails to treat him as an end, whereas killing him in self-defence does not so fail, then you have certainly not understood what he referred to as 'failing to treat somebody as an end.' At the same time, it would be very difficult, after a simple explanation had been given, to take seriously any normally educated person in our society who protested that he found what Kant meant by 'treat as an end' simply opaque.

Inasmuch as it has to do with duties to human beings, oneself or others, traditional western morality has, so I maintain, only one fundamental principle, although that principle may be formulated in a variety of ways, and has been. In what follows I shall make use of a Kantian formulation of it, rather than the one I have preferred in my own writings on moral theory. I do so in part because such Kantian formulations will be familiar to all serious students of philosophy and in part because my not clinging to the formula I prefer may illustrate that several different formulations will do equally well. The formulation I shall employ is: *It is contrary to practical reason for any rational being to perform any action in which he fails to treat every human being as an end in himself.*

That this is its sole fundamental principle by itself would suffice to establish that morality is not an axiomatic system, in which nothing but fundamental principles may serve as premises in deductions. No significant specific precept can be deduced from the fundamental principle of morality alone. Every advance in moral knowledge rests on a new premise in which a kind of action is affirmed to be either a species of the general kind in which the doer fails to treat every human being as an end in himself, or else a subspecies of such a species. These additional premises, which may conveniently be labelled 'specificatory,' are not in themselves moral: their content is theoretical, not practical. That killing another who neither injures nor threatens to injure anybody fails to treat him as an end in himself does not by itself entail that it is morally wrong (that is, that practical reason forbids it): it is a purely theoretical specification of one kind of action in which the doer fails to treat every human being as an end in himself, which anybody who has grasped the concept of treating somebody as an end in himself may work out, irrespective of his moral position. In the same way, even

though he has a low opinion of English Common Law as a legal system, a legal theorist aware of the Common Law conception of larceny as the felonious taking and carrying away of the personal goods of another, so that real estate, and things that adhere to real estate such as corn, grass, trees and the like, cannot be subjects of larceny, because they cannot be carried away, nevertheless should not need a Blackstone to inform him that, while pasturing your sheep on a neighbour's grass is not larceny, yet cutting his grass and then carrying it away is.¹² Legal and moral reasoning alike depend on informal conceptual analysis. And it is no great feat of conceptual analysis to observe that cutting converts grass from something that adheres to real estate into something movable and so personal, and thence to arrive at the specificatory premise that taking and carrying away another's grass, after cutting it, is taking and carrying away his personal goods.

Can any restrictions on the forms of property a political society may institute be derived from our Kantian fundamental principle by rationally defensible specificatory premises? And if they can, what are they?

These questions are most economically approached by critically examining Locke's theory of the transformation of property from a natural institution to a social one; for that theory, while central to most modern investigations of property (including those hostile to it), has roots in traditional western morality. Three kinds of property may be distinguished in Locke's work: property in human beings and their labour or services, property in natural resources, and property in the products of human labour employed upon natural resources. By nature—that is, apart altogether from political society—Locke held that every human being is '*Proprietor of his own person*, and the actions or *Labour* of it,'¹³ and that natural resources 'belong to Mankind in common, as they are produced by the spontaneous hand of Nature.'¹⁴ In maintaining that, in a state of nature, natural resources are common property, Locke did not imply that they are in that state used by mankind collectively. He meant no more than that every human individual alike may use them. However, since natural resources can be used in certain ways, for example, agriculture, only if those who so use them, for example by planting a field, can exclude others from the portion they use, Locke argued that the common property of all mankind in the resources of the earth confers on each man the right exclusively to appropriate as much of the earth as he 'Tills, Plants, Improves,

Cultivates and can use the Product of'; for 'He by his labour does, as it were, inclose it from the Common.'¹⁵

Locke nevertheless perceived two restrictions implicit in his doctrine that, in the state of nature, natural resources could be appropriated by 'mixing' labour with them.¹⁶ The first is that more than a man 'can make use of to any advantage of life before it spoils' is 'more than his share, and belongs to others.'¹⁷ The second is perhaps rather a condition than a restriction: namely, that in the state of nature, appropriating a parcel of land by improving it could not have been 'any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use.'¹⁸

Even in the state of nature, agreements between human beings to put a value on scarce durable objects, like 'little piece(s) of yellow metal,' transform appropriation. Before such agreements, since exchanges of property are confined to goods that must be used before they spoil, nobody either can acquire very much, or has any reason to. But as soon as products that spoil can be exchanged for durable money, the industrious both can acquire indefinite amounts of movable property that will not spoil, and have reason to acquire it, because power to buy is one of the most versatile forms of power there is. 'Find out something that hath the *Use and Value of Money* amongst his Neighbours, you shall see the same Man will begin presently to *enlarge his Possessions*.'¹⁹

Having by their 'tacit and voluntary consent found out a way'—the use of money—'how a man may fairly possess more land than he himself can use the product of,' human beings 'have agreed to the disproportionate and unequal Possession of the Earth.'²⁰ And having done so, since in the state of nature the enjoyment of their 'Persons and Possessions' is 'very uncertain, and constantly exposed to the Invasion of others,' they have good reason to join in political societies 'for the mutual *Preservation* of their Lives, Liberties and Estates.'²¹ For political societies provide three things they need which the state of nature does not: (1) 'an *establish'd* settled, known *Law*, received and allowed by common consent to be . . . the common measure to decide all Controversies between them'; (2) 'a *known and indifferent Judge*, with authority to determine all differences according to the established *Law*'; and (3) '*Power* to back and support the sentence when right, and to *give* it due *Execution*.'²²

The function of political society, according to Locke's theory,

is not to endow human beings, by legislation, with rights to their lives, liberties and estates, but to preserve the rights to them with which nature, their nonpolitical agreement to use money, and their free transactions with one another have together endowed them, and to regulate those rights according to laws that enjoy common consent. Political societies that invade those rights on the pretext of regulating them forfeit the very ground of their existence.

According to Locke's theory, '*the great foundation of Property*,' both in natural resources and in the products of employing labour upon them, is each human being's property in his own person and his own labour.²³ At first sight, this is consistent with the Kantian principle that every human being is always to be treated as an end: would it not fail to treat him as an end to hold that either his person or his labour belong to anybody but himself? Yet there is difficulty. If his person and his labour are his property, may he not sell them, as he may sell his other property?

With regard to his person, Locke denied that he may, on the ground that, since no human being has the right to take his own life, and since slavery is a state in which the slave has no rights against his owner, not even that of preserving his life, the sale of one's person to another would be invalid as purporting to transfer to another a right the seller does not himself possess. 'No body can give more Power than he has himself.'²⁴ Such a restriction, however, betrays an inconsistency in Locke's theory. Of course one owner's property may be restricted by the rights of others in it: for example, entailed property cannot be sold because of the right of others to inherit it. But no human being can have more than a limited property in his own person if another (namely God) has rights in it that limit his power to dispose of it. And yet if no human being is (as Locke elsewhere describes him) 'absolute Lord of his own Person'²⁵ his rights in his own person cannot generate unlimited property either in his own labour or in the natural resources with which he mixes it.

Locke could have escaped his inconsistency in either of two ways. He could have stuck consistently to the position that man is absolute Lord of his own person, and acknowledged his right to sell himself into slavery. Or he could have abandoned his doctrine that human beings' property in their own persons is the great foundation of property. Our Kantian first principle requires the latter.

To reduce the person of a human being to a chattel at the disposal of another is the same thing as to reduce him to a mere

means to that other's purposes. This is directly contrary to the Kantian principle, not only for others, but also for himself. A man has no right to sell himself into slavery, not because his property in his person is limited by other claims upon it, but because the duty to treat himself as an end is his as well as others'. If Locke had followed this line of thought he would have condemned slavery far more radically and comprehensively than he did. For then he could not well have overlooked the flaw in the ground on which he did permit slavery: when it is '*the State of War continued, between a lawful Conqueror, and a Captive.*'²⁶ According to the first principle of traditional morality, as Blackstone pointed out, 'war is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners, but merely to disable them from doing harm to us, by confining their persons . . . Since . . . the right of *making* slaves by captivity, depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise.'²⁷

If human beings are of such a nature that no political society has the right to reduce any of them to slavery or to hold them in it, what moral obligations are there towards either slaves or their owners in political societies in which slavery is legally established? Within traditional morality there have been two answers. The first was given by William Whewell a little over a century ago, when there were still slaves in the United States, and when the Fugitive Slave Act was still in force. It was that, while slavery is utterly wrong, the laws of a genuine political society are not annulled because they uphold it—not even those enforcing the morally spurious property rights of slaveowners. It is, of course, everybody's duty to do all that can be done to repeal laws establishing slavery, but it would nevertheless be wrongful civil disobedience to help a slave to escape, even though it would not be stealing from his owner, because there can be no property in human beings.²⁸ A second answer was given by most Abolitionists. It was that actively to abet a moral wrong is itself a moral wrong, and that to take any part whatever in upholding laws maintaining slavery would actively abet a moral wrong. To this it was added that, since it is a moral duty not to stand idly by when another human being is suffering violence or fraud and it is in your power to help, it would not be enough merely to refuse to take part in upholding slave laws; it would also be a duty, so far as it was possible, to give aid to anybody who violated those laws.

I do not see how, within traditional morality, the Abolitionist answer can be denied. There is indeed a moral duty to uphold the laws of political societies; but that duty itself derives from the fundamental principle that every human being is to be treated as an end, by way of the specificatory premise that not to uphold such laws of an established political society as accord with that principle would fail to treat as ends the human beings whose political will that society embodies. However, without the proviso that the laws to be obeyed accord with the fundamental principle it is sufficiently plain that the specificatory premise would not be true. The fundamental principle of morality provides a ground for all sorts of institutionally created duties, but it cannot provide for its own violation.

The first restriction derivable from the fundamental principle of morality on morally permissible forms of property is therefore that there can be no property in the persons of human beings. Chattel slavery is morally wrong, and laws instituting it are morally void. But that cannot be all. A human being who is not a chattel (who cannot be killed or maimed at the will of his owner, or bought and sold, and who can own property, enter into contracts, and have political rights) may nevertheless be completely subject, throughout his life, with respect to his labour. Immediately after declaring that a slave 'the instant he lands in England, becomes a freeman,' Blackstone went on to lay it down that 'any right which [his] master may have acquired, by contract or the like, to [his] perpetual service . . . will remain exactly in the same state as before.'²⁹ Yet would not holding a human being in a state of total and perpetual servitude, although a less flagitious wrong than reducing him to a chattel, nevertheless grossly fail to treat him as an end in himself?

Blackstone (and implicitly Locke) thought not, and the reason Blackstone gave merits examination. Perpetual servitude 'is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term.'³⁰ It seems beyond question that apprenticeship contracts are morally permissible. Why should contracts of total and perpetual servitude not be so as well?

An answer at once springs to mind. A free rational being—an end in himself—will contract to place his labour at another's disposal only if thereby he gains something that seems to him more worth having. Seven years' apprenticeship appears to many not to be too great a price to pay for thorough training in a craft. But the

only consideration that might induce anybody in his right mind to contract to place himself in total and perpetual servitude would be to save his life, his sanity, or perhaps his major bodily capacities (for example, sight, hearing, the use of his limbs). And since adult human beings in normal circumstances are capable of providing their own livelihood, such human beings could be confronted with a choice between perpetual servitude and loss of life, sanity or major bodily capacity only by credibly threatening either to cause them grave bodily harm, or forcibly to deny them access to natural resources or tools. In no morally decent society would such threats be tolerated. As for adult human beings who through no fault of their own are unable to provide for themselves, they are, like other unfortunates such as the handicapped and ill, proper objects of the duty of beneficence, not legitimate prey for human predators.

Following this line of thought, it is natural to conclude that, when contracts to exchange labour for other goods are made in conditions that accord with morality, questions about their validity will seldom arise. While there can be no objection in principle to attempting to establish that certain kinds of labour contract are immoral, contracts of total and perpetual servitude being an example, such an exercise would be of little practical importance. When the conditions under which labour contracts are reached are just, contracts that would be grossly exploitative, besides finding few or no takers, would be too opprobrious even to be offered. Blackstone implies that according to the laws of England in the eighteenth century contracts of perpetual servitude would have been legal; but the longest period of contractual service he mentions as being normal was that of apprenticeship: seven years or 'sometimes for a longer term,' but obviously one of the same order.

We should, nevertheless, inquire how morality restricts the conditions under which a labour contract may be reached. Traditional answers to this question dwelt on conditions which anybody entering the labour market must satisfy: those having to do with such things as age, possession of marketable skills or of power to acquire them, and access to natural resources and tools. But in his justly celebrated *Theory of Justice*, John Rawls has proposed an answer in terms of distributive justice that is nontraditional at first sight, but which he has arrestingly protested to be no more than an application of the Kantian first principle.³¹

Asking himself whether there are 'substantive principles,' as distinct from merely formal ones, which convey 'the notion of treat-

ing men as ends in themselves and never as only a means,' Rawls answers that 'it seems that' his own two principles of justice do 'achieve this aim.'³² Since they cannot be treated as ends in themselves if their fundamental liberties are infringed, the first principle of justice must be that 'Each person is to have an equal right to the most extensive system of equal basic liberties compatible with a similar system of liberty for all.' This principle is to take priority over all others, so that 'liberty can only be restricted for the sake of liberty.'³³ But what is it, while treating somebody as a means, not to treat him only as a means, but also as an end in himself? Rawls's answer is as subtle as it is economical.

To regard persons as ends in themselves in the basic design of society is to agree to forgo those gains which do not contribute to their representative expectations. By contrast, to regard them as means is to be prepared to impose upon them lower prospects of life for the sake of the higher expectations of others.³⁴

This generates his second principle of justice, of which clause (a) is usually referred to as 'the difference principle':

Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity.³⁵

It is also laid down that clause (b), providing for fair opportunity, 'is prior to the difference principle.'³⁶

The difference principle amounts to a requirement that social and economic goods are to be distributed equally, except to the extent that an unequal distribution will benefit the worst off. Is this principle, subject to the priority of liberty and of fair opportunity, a reasonable specification of what the Kantian first principle implies for the distribution of social and economic goods?

It is fundamental to Rawls's thinking, as it was to Locke's, that only by social co-operation can the individuals composing a modern political society produce the enormous volume of goods and services they do. Working in isolation as individuals, their aggregate product would be tiny by comparison. Now, as Rawls points out, 'persons are not indifferent as to how the greater benefits produced

by their collaboration are to be distributed, for in order to pursue their ends they each prefer a larger to a lesser share.³⁷ There must be social agreement on how benefits are to be distributed, and in a just society it will be agreed that they are to be distributed fairly. Well, would it not be fair to allot to each a share in the social product proportional to the value of his productive contribution to it? Not according to Rawls. For what a given individual is able to contribute will depend in part on his natural endowments, and in part on how far his place in society as child and youth enabled him to cultivate those endowments; and 'one of the fixed points of our considered judgments [seems to be] that no one deserves his place in the distribution of native endowments, any more than one deserves one's starting place in society.'³⁸ Nor is even the magnitude of one's conscientious effort a fair measure of the share to which one is entitled: 'the better endowed are more likely, other things equal, to strive conscientiously, and there seems to be no way to discount for their greater good fortune.'³⁹ Hence a fair society must redress the bias of contingencies in the direction of equality.⁴⁰ But unfortunately, distribution affects production, and distributing the social product equally would so diminish it that everybody would get less than he might. And so Rawls concludes:

No one deserves his greater natural capacity nor merits a more favorable starting place in society. But it does not follow that one should eliminate these distinctions. There is another way to deal with them. The basic structure [of society] can be arranged so that these contingencies work for the good of the least fortunate.⁴¹

This amounts to an indirect answer to our question, 'What restrictions are imposed by the Kantian principle on the conditions under which a labour contract may be reached?' It is indirect, because it specifies them by reference to their outcome. They are whatever restrictions will have the effect of maximizing the social and economic goods that fall to the lot of the least fortunate. As an interpretation of Kant this answer is surprising, but none the worse for that. However, as its implications were explored, especially along the lines opened up by Robert Nozick,⁴² serious difficulties were disclosed, not only in it, but in any answer in terms of the outcome (or, in Nozick's vivid terminology, of the 'end state') that restrictions on the conditions of labour contracts are to bring about.

While no thinker can intelligibly advance a moral theory which he acknowledges to be at odds with his practical convictions, students of the writings of a moral theorist will dig a pit for themselves if they assume that everything for which he stands in practice must be compatible with his theories. Thus even if it be true, as C. B. Macpherson has ably contended, that Locke's practical object was to promote what Marxists call the dictatorship of the bourgeoisie, only by violence can the text of his *Second Treatise on Government* be read as always doing so.⁴³ Rawls's *Theory of Justice* contains not only a theory, but also descriptions of how it may be applied. Such passages as Section 43, entitled 'Background Institutions for Distributive Justice,' demonstrate beyond doubt that the institutions he would propose for applying his difference principle are liberal, and not in themselves morally objectionable. But we are not entitled to infer that the difference principle, in his theory as a whole, has only the liberal applications he himself would countenance.

Just what social structures would, in a given situation, and consistently with the prior principles Rawls recognizes, secure the result that differences in productive capacity work for the good of the least fortunate? That radicals notoriously differ from liberals about how the least fortunate are to be benefited may perhaps be dismissed as beside the point, since most radicals deny the priority of the principles of liberty and fair opportunity to the difference principle. But can it be shown that a society which accepted the difference principle, even if it scrupulously observed the priority of the principles of liberty and fair opportunity, would necessarily confine itself to liberal measures? And even if there were historical-sociological reasons for believing that a given society would as a matter of fact, can it be shown that its Rawlsian principles require it?

Rawls acknowledges it to be clear, 'in theory anyway,' that 'a liberal socialist regime can also answer to the two principles of justice.'⁴⁴ That is important, as well as true. But it is even more important to determine whether or not an *illiberal* socialist regime can also answer to his two principles of justice. Might it not be the case in certain social situations that the least fortunate would be advantaged by a social system the institutions of which included maximum wage laws, a prohibition on any citizen acquiring capital goods out of his savings, or paying wages to others who choose to work for him, or perhaps, even outright conscription and direction of labour? Rawls indeed asserts that, on his theory, 'there is no

reason at all for the forced and central direction of labour.'⁴⁵ But he does not offer to demonstrate it.

The theoretical position is this. According to Rawls, a labour contract is just provided that the basic structure of the society in which it is arrived at is such that, subject to observance of the principles of liberty and fair opportunity, there are no economic and social inequalities that do not work for the good of the least fortunate. Now whether a society's basic structure satisfies these conditions will depend on various factors in the situation that confronts it: for example, on what natural resources and capital are to hand, and on what are the skills, social habits, and political attitudes (consistent with justice) of its population. It is a complex technical question whether or not a given situation is such that a liberal basic structure can be found which in it would satisfy Rawls's conditions; but there can be no doubt at all that many situations are conceivable in which some technical experts would maintain that the only Rawlsian options are illiberal. Nor do I think it can be part of a theory of justice that serious technical opinions about possible practical situations must be in error.⁴⁶

Are illiberal measures such as the forced and central direction of labour excluded by the principles of liberty and fair opportunity? Rawls lists the basic liberties laid down in the former as being 'roughly speaking' these: 'political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.'⁴⁷ Now *these* basic liberties would not directly exclude the conscription of labour in time of peace, much less such milder measures as maximum wage laws. Nor would a requirement that social and economic inequalities be attached to offices and positions open to all under conditions of fair equality of opportunity—although the word 'opportunity' is less than felicitous when the inequalities are burdens rather than rewards. Would they nevertheless indirectly exclude it, by ensuring that the legislative and executive branches of a just political society would not adopt illiberal measures? Admittedly, no free political society has enacted the servile restrictions on individual labour and enterprise that prevail in the Soviet Union, except under Soviet military occupation or the threat of it; but historical experience of free political societies is meagre. Recent events in South America give reason to suspect

that political societies there that gain freedom may well elect to direct labour centrally, according to expert advice that only so can the greatest benefits to the least fortunate be assured.

Yet control of labour to bring about any preferred distribution of social and economic goods would be flatly incompatible with the Kantian first principle of morality.

That principle does not deny that the basic structure of a morally permissible society must be such that its members have reasonable opportunities to support themselves by their labour. Fourier magnified what is owed when he contended that 'since the process of civilization had deprived the members of society of certain liberties (to gather, pasture, engage in the chase), a socially guaranteed minimum provision for persons was justified as compensation for the loss'; but Nozick belittles it when he argues that compensation is owed only to 'those for whom the benefits of civilization [do] not counterbalance being deprived of those particular liberties.'⁴⁸ I shall shortly return to the topic of what is owed to each member of a society for his acceptance of the established system of property in natural resources.

Whether or not human beings each have some right to the resources of the earth, the moral condition on which a political society is owed the loyalty of its members is that they be treated as ends in themselves. A fundamental element in a human adult's character as an end in himself is that, normally situated, he is able to provide for his own needs by his own labour. No political society is morally legitimate if its institutions are not such that its members are prepared to earn a living on reaching adulthood, and that they are offered the opportunity of doing so without servitude. What this implies about the conditions of labour will vary according to what productive system may be in force. There are societies of food-gatherers and hunters that enable their members to earn their livings without servitude; and it is a scandal that so many more productive societies fail to do so.

Does not the fact that not all human beings are adults, and that not all adults are in the normal state of being able to support themselves, impose moral requirements on those adults who are? And might that requirement not take the form of a restriction on the conditions of labour? Of course. The fundamental principle of morality does not deny the duty of beneficence: the duty of the better off to help the worse off. On the contrary, it emphatically affirms it. But on its presupposition that adult human beings nor-

normally support themselves, either alone or in families, to help another human adult is primarily to supply him with the means of recovering from an injury or loss caused either by misfortune or by the misdoings of others. Beneficence does not require one normally situated human adult to support another. Those whom it is the duty of normally situated adults to support, as far as they reasonably can, are either not yet adults (their own children, or orphaned ones), or adults who through misfortune or the misdoings of others either have never been able to support themselves (the gravely handicapped, physically or mentally), or have ceased to be members of self-supporting families (widowed or abandoned mothers of young children), or have ceased to be self-supporting (the sick, the injured, the destitute aged). Whether help for those who by these criteria need it is provided by private or public arrangements does not matter, as long as it is provided. It is certainly legitimate for a political society to choose to make public provision for them, and to defray the costs by a tax graduated according to ability to pay.

The idea underlying traditional beneficence—that normally situated adults are self-supporting—has nothing in common with that underlying the difference principle—that if one adult produces more than another, the difference is to be added to a common pool, and shared equally unless the result of doing so would reduce the amount of the smallest share.⁴⁹ The one is a principle of freedom: it imposes duties of beneficence on the self-supporting, but finite ones. Having discharged them, they are free: either to produce more, or to be idle; and if they produce more, to do with the product what they choose. The latter is a principle of servitude: not only does it expropriate to a common pool everything above the minimum contribution to the social product, returning only what is necessary to ensure that that difference will continue to be produced, but it also requires a social structure that takes away the option of idleness when one's own needs and the demands of beneficence have been met. Rawls's notion that to treat persons 'as ends in themselves in the basic design of society is to agree to forgo those gains which do not contribute to their representative expectations'⁵⁰—or, in other words, that it is to agree to forgo the difference by which one's own product exceeds that of another, except to the extent that retaining it would gratify the expectations of the worst off—is a fundamental mistake. On the contrary, a society in which persons are treated as ends in themselves would be one the basic structure of which is such that they can normally support them-

selves without servitude or servility, and do, looking for help only when, through misfortune or the misdoings of others, they are in need.

Locke's doctrine that every human being is proprietor of his own person, and of the actions or labour of it, although false in both its parts, nevertheless reflects two fundamental moral truths. As ends in themselves human beings are capable of proprietorship, but are such that their own persons cannot be property at all, their own or anybody else's. As for their labour, subject to the duties of supporting themselves and fulfilling their part of the common obligation to help those in need and to maintain and defend their society, it is for each to decide for himself whether to work or not, and under what conditions. To the extent that their society compels them, over and above fulfilling these obligations, to work for the benefit of others, it wrongfully reduces them to servitude.

Those who are sympathetic with the position that it is wrong to appropriate even part of anybody's labour for a common pool, to be shared out on some end-state principle of distributive justice, tend also to reject end-state principles for the just distribution of natural resources. But it does not follow, because end-state theories of distributive justice are wrong for labour, that they must be wrong for natural resources.

The usual alternatives to end-state theories of just distribution have been called by Nozick 'entitlement' theories.⁵¹ Such theories justify a distribution, not because of its character as an end-state, but because it has come about by legitimate processes from a legitimate original state. The theory I have sketched about the distribution of labour is an entitlement theory: the labourer himself is entitled to work or not under what conditions he pleases; and if he freely contracts to work for somebody else, that person is entitled to that labour.

Entitlement theories of property in natural resources are for the most part variants of Locke's. The pertinent elements in Locke's theory, which I have already outlined, are four: (1) whatever is produced by the spontaneous hand of nature belongs to mankind in common; (2) apart from political society, each human being may appropriate natural resources by mixing his labour with them, provided that he does not allow what he appropriates to spoil, and that he leaves enough and as good for others; (3) property in what is appropriated may be transferred to others by gift or exchange—whether for other goods or services, or for money; and

(4) political society regulates both further appropriations of natural resources, and transfers of property by gift or exchange.

Although Locke advanced this as a serious theory of property in natural resources in eighteenth century Europe and America, it is hard to see how even he could have taken it for more than a pious fiction. Entitlement theories of labour present no such problems: the original title is clear, and transfers few. But in no political society on earth can titles to land be traced, through legitimate transfers, to an unblemished title of original appropriation.

There is a more fundamental objection, which has been decisively put by Richard Epstein: 'Property may look to be an individualistic institution, but the very nature and definition of the right seems to require some collective social institution as its base. No "natural" act can legitimate a social claim to property.'⁶² This point holds even on the assumption of Roman law that nothing is owned until somebody takes possession of it. But as Epstein also points out, on Locke's view that all natural resources are originally the common property of all mankind, it is utterly inexplicable why an individual's act in working on a piece of common property without some kind of social sanction should be regarded as anything but an intrusion—as a foodgathering society would presumably regard the work of a homesteader.⁶³

To distribute labour on Rawls's difference principle would be wrong, so I have argued, because the labour of individuals is not a contribution to a commonly owned pool. But if Locke's doctrine be accepted that whatever is produced by the spontaneous hand of nature belongs to mankind in common, why should the difference principle not apply to it? A celebrated satirical passage in Nozick's *Anarchy, State and Utopia* is to the point here:

Imagine a social pie somehow appearing so that *no one* has any claim at all on any portion of it, no one has any more of a claim than than other person; yet there must be unanimous agreement on how it is to be divided . . . If things fell from heaven like manna, and no one had any special entitlement to any portion of it, and no manna would fall unless all agreed to a particular distribution, and somehow the quantity varied depending on the distribution, then it is plausible to claim that persons placed so that they could not make threats, or hold out for spe-

cially large shares, would agree to the difference principle rule of distribution.⁵⁴

Anybody whom the feeding of the Israelites with manna reminds of the gift to man of the earth and all it brings forth, may well find himself composing a variation upon Nozick's words like this:

The natural resources of the earth are like manna from heaven: no one originally has any special entitlement to any portion of them, although if we cannot agree to a particular distribution, we shall be unable peaceably to get much benefit from them. Yet how much benefit any of us gets—even the worst off—depends on how the exclusive use of natural resources is distributed. And since none of us has any special claim as an individual, it would be unfair to adopt any distribution that disadvantages anyone. The only distribution that satisfies this condition is one, equal or not, in which the benefits to the worst off are maximized.

While Nozick appears not to have anticipated that his readers might reason along these lines, he has nevertheless implicitly acknowledged that it is tempting to do so. I think we can go further, and conclude that it is sound.

Complications follow. The natural resources of the earth are neither parcelled out among political societies or exclusively allotted to any one generation. Every human being shares in the common property of mankind, those of the future equally with those of the present and the past. For a preliminary exploration of these complications, I cannot do better than refer you to Rawls; and nobody to my knowledge has yet made much advance on his preliminaries.

If natural resources are the common property of all human beings, and if the value of each human being's share in that common property is to be determined according to the difference principle, then we can accept neither Fourier's answer nor Nozick's to the question, 'What is owed to a human being in return for his relinquishing the right to use the earth in common (to gather, pasture, and hunt)?' He is not necessarily owed a socially guaranteed minimum provision, because his share according to the difference principle in the value of the contribution of natural resources to the total social product may fall short of a 'minimum provision';

but he will certainly be owed more than what the right to gather, pasture or hunt would have been worth before systematic cultivation, because the value of natural resources is increased by the development of productive techniques.

In what institutions would the common property rights of human beings in natural resources be best safeguarded? I do not know. Certainly I do not propose a worldwide holding company, in which every human being would have a share according to the difference principle, and in which all property in natural resources would be vested, to be leased or rented to producers according to the interests of the shareholders. However, the idea of such a company has a certain value as a myth, in setting forth the implications for property in natural resources of the traditional conception of human beings as ends in themselves, having property in common in whatever is produced by the spontaneous hand of nature.

Decisions about institutions must be taken politically. And in taking them the results of legal theory as to what is good law and what is not must be allowed due weight. I accept Epstein's point that

some weight should be attached to the rules under which a society in the past has organized its property institutions. Where those rules are respected there is no need to reshuffle entitlements amongst different individuals, in the absence of any clear principle that dictates how that reshuffling should take place. There is no need, moreover, to attack the interests of those who have expended their labor and taken their risks on the expectation, reasonable to all concerned, that the rules under which they entered the game will be the rules under which that game will be played until its conclusion. These rules and these alone have the status of legal rules at all.⁵⁵

However, unlike him, I think that there is a clear principle according to which entitlements among individuals ought to be revised and to some extent reshuffle, although it does not dictate its own application.

The implications of traditional morality for the institution of property have turned out to be complicated. Property is a social institution the specific forms of which must be determined politically—by the legislative and judicial processes of political societies. By sanctioning the existence of political societies except under the

special conditions of justified rebellion, traditional morality enjoins obedience to their laws, save only when those laws violate it. Hence it also enjoins acceptance of the institutions they establish, save only when those institutions violate it. Thus morality may place constraints on what forms of a given institution are morally permissible. I have explored some of the constraints it places on forms of the institution of property, with regard to the persons of human beings, their labour, and natural resources. These constraints imply others, which I have not explored at all, on property in the movable products of employing labour on natural resources. I offer these incomplete results, despite their flaws, in the hope that they may help to persuade you both that morality has implications for the institution of property, and that establishing a system of property is a political matter, which cannot be wholly determined by moral considerations. If I have helped to persuade you of these two things, I do not mind very much if I have not persuaded you of my more specific conclusions. If you have discerned mistakes in what I have done, you are already in a way to correcting them.

Notes

1. In *The Theory of Morality* (Chicago: University of Chicago Press, 1977), I have done what I could to further this process.
2. Philippa Foot, 'Morality as a System of Hypothetical Imperatives,' *Philosophical Review* 81 (1972): 305-316.
3. Thomas E. Hill, Jr., 'The Hypothetical Imperative,' *Philosophical Review* 82 (1973): 429-50, esp. 429-32.
4. Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (2nd edn. Riga 1786), 49-52 (Ak. edn., 419-21).
5. Kant, *Grundlegung*, 79 (Ak., 436).
6. Bruce Aune, *Kant's Theory of Morals* (Princeton: Princeton University Press, 1979), esp. chs. 2, 3.
7. Henry Sidgwick, *The Methods of Ethics* (7th edn., London: Macmillan 1907), 390; W. D. Ross, *Kant's Ethical Theory: a Commentary on the Grundlegung zur Metaphysik der Sitten* (Oxford: Clarendon Press, 1954), 51. On this matter, too, the times are a-changing: see Aune, *Kant's Theory of Morality*, 77-83; and Thomas E. Hill, Jr., 'Humanity as an End in Itself,' *Ethics* 91 (1980-81): 84-99, esp. 87-93.
8. 'Nun sage ich: der Mensch, und überhaupt jedes vernünftige Wesen, existiert als Zweck an sich selbst, nicht bloss als Mittel zum beliebigen Gebrauche für diesen oder jenen Willen . . .' Kant, *Grundlegung*, 64 (Ak., 428). (Tr. L. W. Beck.)
9. In *The Theory of Morality*, 57-66, 229-39.
10. Alan Gewirth, *Reason and Morality* (Chicago: Chicago University Press, 1978).
11. *The Theory of Morality*, 59-66.
12. William Blackstone, *Commentaries on the Laws of England*, a Facsimile

of the First Edition of 1765-69, 4 vols. (Chicago: University of Chicago Press, 1979), Book IV, ch. 17 (vol. iv, 232-34).

13. Peter Laslett (ed.), *John Locke: Two Treatises of Government* (rev. edn. New York: Mentor Books, 1965). *Second Treatise*, §44 (p. 341); cf. §27 (pp. 328-29).

14. Locke, *Second Treatise* §26 (p. 328).

15. Ibid. §32 (p. 332).

16. Ibid. §27 (p. 329).

17. Ibid. §31 (p. 322).

18. Ibid. §33 (p. 333).

19. Ibid. §46-50 (pp. 342-44).

20. Ibid. §50 (p. 344).

21. Ibid. §123 (p. 395).

22. Ibid. §§124-26 (pp. 396-97).

23. Ibid. §44 (p. 341).

24. Ibid. §23 (p. 325).

25. Ibid. §123 (p. 395).

26. Ibid. §24 (pp. 325-26).

27. Blackstone, *Commentaries*, Book I, ch. 14 (vol. i, p. 411).

28. William Whewell, *The Elements of Morality, including Polity* (4th edn., Cambridge: Deighton Bell, 1864), §§426-27 (pp. 231-32).

29. Blackstone, *Commentaries*, Book I, ch. 14 (vol. i, pp. 412-413).

30. Ibid. Book I, ch. 14 (vol. i, p. 413).

31. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 179-83. Rawls warns his readers that he does not expound the Kantian text, but rather 'freely interpret[s] it in the light of [his own] contract doctrine' (ibid., 179).

32. Ibid., 180.

33. Ibid., 302.

34. Ibid., 180.

35. Ibid., 302.

36. Ibid., 302-03.

37. Ibid., 4.

38. Ibid., 104.

39. Ibid., 312.

40. Ibid., 100-01.

41. Ibid., 102.

42. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

43. Cf. C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962). For pertinent comment see Laslett's Introduction to *John Locke: Two Treatises of Government*, pp. 114-20, and Alan Ryan, 'Locke and the Dictatorship of the Bourgeoisie' in C. B. Martin and David Armstrong (eds.), *Locke and Berkeley: A Collection of Critical Essays* (Garden City, N.Y.: Doubleday, 1968), 231-254; reprinted from *Political Studies*, 13 (1965).

44. Rawls, *A Theory of Justice*, 280 (my emphasis).

45. Ibid., 272; cf. 280-81.

46. Dismissing merely fantastic cases, or cases contrary to the laws of nature, would be another matter.

47. Rawls, *A Theory of Justice*, 61.

48. Nozick, *Anarchy, State and Utopia*, 178-9n. Nozick cites Alexander Gray, *The Socialist Tradition* (New York: Harper and Row, 1968), 180, as the source of his information about Fourier's doctrine.

49. To describe one person as producing more than another is a simplification, except when the products of both are of the same kind. It would be more accurate to describe the product of one as being of more value than that of another, but even that would simplify: what matters is the marginal product of each, and that can be measured in different ways with different results. However, as Nozick points out, the difference principle itself presupposes that in practice the marginal products of individual contributors to a joint product can be reliably estimated. 'If the product was all that inextricably joint,' he observes, 'it couldn't be known that extra incentives were going to the crucial persons; and it couldn't be known that the additional product produced by these now motivated people is greater than the expenditure to them in incentives . . . But Rawls's discussion of justifiable inequalities presupposes that these things can be known' (*Anarchy, State and Utopia*, 188-89).

50. Rawls, *A Theory of Justice*, 180.

51. Nozick, *Anarchy, State and Utopia*, 150-153.

52. Richard A. Epstein, 'Possession as the Root of Title,' *Georgia Law Review* 13 (1978-79): 1228. Epstein refers to Kelsen, *The Pure Theory of Law*, *Law Quarterly Review* 50 (1934): 474, 494, as recognizing this point.

53. Epstein, *Georgia Law Review* 13 (1978-79): 1229. He refers to Gaius, *The Institutes of Gaius*, Second Commentary, tr. in 1 *The Civil Law* §66 (ed. S. P. Scott, 1932).

54. Nozick, *Anarchy, State and Utopia*, 198.

55. Epstein, *Georgia Law Review* 13 (1978-79): 1241.

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†† Printed only in *Freedom and Morality*.